YEO AH TEE

v.

LIM KENG SIONG & ANOR

HIGH COURT MALAYA, MELAKA
WAN YAHYA PAWAN TEH J
[CIVIL SUIT NO. 93 OF 1976]
5 JUNE 1982

CONTRACT: *Sale of land - Action for specific performance - Whether agreement "subject to contract" - Intention of parties, whether time essence of contract - Short period given for completion - Effect of - Delay and failure to notify intention to abandon contract.*

The defendants, who were owners of a piece of land in Melaka, wrote to C.H. Williams, Talhar & Wong Sdn. Bhd. on 14 December 1974 of their intention to dispose of the land. On 1 March 1976 they sent a letter stating that subject to contract, they confirmed that the lowest price they were willing to sell the land was $5.40 per sq. ft. in Singapore currency. After negotiations by telephone with an estate agent, who was an estate valuer of C.H. Williams, Talhar & Wong and agent of the plaintiff the sale of the land at RM5.20 per sq.ft. was orally accepted by the defendants. The estate agent, as instructed by the plaintiff, then wrote confirming the defendants' acceptance of the offer. This was followed by a letter from the plaintiff's solicitors referring to the above letter and confirming the sale, together with a cheque for 10% deposit and a copy of the draft agreement for the defendants' approval and signature. The defendants acknowledged receipt of the letter and banked the cheque. Then on 22 March 1976 by a letter which was received by the plaintiff on 24 March 1976, they forwarded two title deeds relating to the property and the draft contract with some amendments. They also raised the amount of deposit from 10% to 20% of the purchase price, and concluded by stating that the contract must be completed and the remaining deposit forwarded by 31 March, failing which the negotiation for the sale and purchase of the land would be treated as abortive.

The plaintiff sent the additional deposit under cover of a letter dated 29 March but the agreement was despatched only two days later. Both letters were acknowledged by the defendants by letter dated 2 April 1976.

On 20 April 1976 the defendants requested the return of the title deeds on the ground that the documents were required urgently.

The plaintiff's solicitors wrote to the defendants requesting them to expedite the execution of the agreement. They then wrote on 10 May 1976 threatening legal action. The defendant's reply to this was that the sale was abortive and the plaintiff could do as he wished.

The defendants did not dispute the facts but contended that by the letter dated 1 March 1976 and addressed to C.H. Williams, Talhar & Wong, they had made the agreement "subject to contract" intending not to conclude the contract until the execution of proper documents and that that letter formed part of the transaction. The terms stated therein should be read with and into the terms of the other letters as well as the plaintiff's pleadings.

Held:

[1] The letter dated 1 March 1976 to C.H. Williams could not be made part of the transaction between the defendants and the plaintiff as:

(a) The letter was written to C.H. Williams and there was no evidence that the plaintiff had any knowledge of its contents at the relevant time.

(b) The letter was sent in the course of negotiations on a separate deal, as it refers to a sale at $5.40 per sq. ft. Singapore currency and not $5.20 per sq.ft.

(c) On the relevant date, 1 March 1976, there was no concluded contract between the defendants and the plaintiff.

(d) No express mention was made of the terms till after part performance of the contract by the plaintiff.

Tai Tong Realty Co. (Pte.) Ltd. v. Galskin & Anor. [1973] 2 MLJ 95; *Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Appliances Ltd.* [1942] 2 KB 32; *Wilson v. Balfour* [1929] TLp 625 and *Malor & Anor. v. Cameron* [1954] 91 CLR. (Australia) 353 on the construction of the term "subject to contract" were distinguishable as in all those cases the intention of the parties was documented either in the form of written option or letter of offer or acceptance. In the case before the Court, however, the offer to sell the property conditionally upon a formal contract being drawn up was only raised after the parties had agreed on the essential terms of the sale.

[2] Even if the clause "subject to contract" was to be considered with the subsequent telephone conversation, it was not a condition or term of the bargain but an expression of the parties' intention on how the formalities of the sale will in fact go through.

[3] The parties intended to conclude the contract on 3 March 1976 when the defendant orally agreed to the offer by the plaintiff's agent.

(i) All the terms necessary to form the contract were orally agreed upon by the parties through the telephone conversations.

(ii) The terms of the contract were immediately communicated to the 1st defendant by letter by the estate agent and confirmed by letter by the plaintiff's solicitors. Neither the defendant nor his solicitors had objected to or derogated from the contents till 23 March 1976 when new conditions were imposed by the defendants.

(iii) The deposit of 10% sent by the plaintiff was accepted and banked without objection.

(iv) A further deposit of another 10% was also accepted and banked without objection though the plaintiff must have been in possession of the agreements by then.

(v) The draft contract embodied all the necessary terms agreed upon. The amendments to the plaintiff's draft agreement were, except for the new conditions, insignificant and immaterial to the concluded oral contract.

(vi) The documents exhibiting to an affidavit in application by the defendants for consolidation of the suit before the Court with another, in which the defendants were being sued for breach of contract of sale in respect of the same land but to different plaintiffs, were clearly admissible in the proceedings before the Court. The documents exhibited to an affidavit form as much part of the affidavit as if they have been actually annexed to and filed with it. [*Palaniappa Chettiar v. Tan Jun & Anor*. [1965] 1 MLJ 182]

(vii) The relevant parts of the exhibit conveyed the unmistakable intention of the defendants to treat the oral agreement made on 3 March 1976 as a concluded contract [*Griffith v. Young* [1970] 1 Ch. 675; *Bigg & Anor v. Boyd Gibbins Ltd*. [1971]: *J.N. Roland and Scott Ltd. v. Yangtzekeang Garment Manufacturing Co. Ltd.* [1978] *Hong Kong Law*

Journal Vol. 8 No. 1350; *Harichand v. Govind* [1923] IA 25; *Shankarlal Narayandas Mundade v. New Mofussil Company Ltd*. [1946] IA 98; and *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck* [1978] 2 MLJ 239 considered].

[4] Even if the signing of the agreement by the defendants by a specified time was a necessary element in concluding the contract, the defendants were nevertheless disentitled to abandon the contract because of the short period arbitrarily imposed on the return of the contract and also for the failure to notify the plaintiff of their intention to abandon it. The period of five days given to the plaintiff was certainly impractical and obviously inequitable. [*Kelly v. Park Hall School* [1979] Current Law Year Book, para. 180]. Similarly by accepting the plaintiff's cheque and banking it and acknowledging receipt of the engrossed agreement without objecting thereto for 11 weeks and well past the period of the arbitrarily imposed date of completion, time no longer remained essence of contract. The defendants should have given notice of intention to abandon the contract if the engrossed agreement signed by the plaintiff was not returned. [*Wong Kup Sing v. Jeram Rubber Estates Ltd.* [1969] 1 MLJ 245].

An order for specific performance as prayed for by the plaintiff to be made, the defendants to execute a transfer of the land to the plaintiff within four weeks of receipt of purchase money, the transfer to be signed by the Assistant Registrar in the event of the defendants' refusal to execute it.

Alternatively, if the order was incapable of specific performance, an order to be made for rescission of the contract, repayment of the deposit with interest and damages for breach of contract to be subsequently assessed by the Court.

Cases referred to:

Tai Tong Realty Co. (Pte.) Ltd. v. Galskin & Anor. [1973] 2 MLJ 95
Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Appliances Ltd. [1942] 2 KB 32
Wilson v. Balfour [1929] TL 625
Malor & Anor. v. Cameron [1954] 91 CLR (Australia) 353
Palaniappa Chettiar v. Tan Jun & Anor. [1965] 1 MLJ 182
Griffith v. Young [1970] 1 Ch 675
J.N. Roland and Scott Ltd. v. Yangtzekeang Garment Manufacturing Co. Ltd. [1978] HKLJ Vol 8 1350
Harichand v. Govind [1923] IA 25
Shankarlal Narayandas Mundade v. New Mofussil Company Ltd. [1946] IA 98
Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck [1978] 2 MLJ 239
Wong Kup Sing v. Jeram Rubber Estates Ltd. [1969] 1 MLJ 245

For the plaintiff - Thara Singh Sidhu (Ting Poi Teck with him)
For the defendants - P. Cumaraswamy

(Digest Form Only)

Also found at [1982] CLJ 573